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Supreme Court, U.S.
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No. 94-481

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

LUIS OLIVEIRA, MILTON OLIVEIRA & ELIAS MOREIRO,

Petitioners

v.

GEORGE MAYER, POLICE CHIEF OF CITY OF STAMFORD, CONNECTICUT, GREGORY TOMLIN, JOHN RAINONE, JOHN F. SCALISE, LAURIE BRETTHAUER, SEAN COONEY, AND DOUGLAS ROBINSON,

Respondents

Petition for Writ of Certiorari to the United States Court of Appeals of the Second Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Did the majority decision of the Second Circuit Court of Appeals (Newman, CJ and Cardamone, J) properly determine that the "reasonableness" of the police officers actions for the purpose of qualified immunity was a question for the jury, after the majority had erroneously affirmed the directed judgment of the trial court that after the police detained the three plaintiffs on suspicion of committing a burglary, a proper Terry stop became an illegal arrest?

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B. STATUTE

42 U.S.C. § 1983 1

STATEMENT OF THE CASE

The Respondents-defendants are police officers who filed a petition for certiorari in the same case as this petition entitled "Mayer, et al v. Oliveira, et al" #94-526. Therefore, the Respondents agree that their Petition for Certiorari should be granted, and that this Petition should be granted, but not for the reasons cited by the Plaintiffs-Petitioners.

Luis Oliveira and two relatives, who are from Brazil and speak Portuguese, sued seven police officers (but not the City of Stamford): Chief of Police George Mayer, Capt. Tomlin (ranking supervisor on the scene) and four individual Police Officers who were on the scene (Bretthauer, Robinson, Cooney, Scalise, and Rainone) under 42 U.S.C. § 1983, for

a 20 minute detention on the Connecticut Turnpike for "possible burglary" on January 4, 1991. The Plaintiffs were pulled over on the Turnpike (I-95), during rush hour, while apparently fleeing to New York. The police responded to a civilian complaint that the Plaintiffs committed a burglary. Because of the nature of the suspected crime, and the hazardous conditions of rush hour traffic on the turnpike, the police used standard "felony" or "high risk" procedures. After the Plaintiffs were exonerated, they were released without arrest. The entire incident (from initial phone call by the civilian complainant, the complainant's following the Plaintiffs' car for 10 minutes from North Stamford to the Connecticut turnpike, to Plaintiffs' release 20 minutes after they

were detained) lasted 33 minutes, according to a computer printout from 911. The Plaintiffs claimed no damages other than fear during the brief detention. Even the plaintiffs' expert agreed that the Stamford police properly stopped the plaintiffs for an "investigative detention" which the trial court and Second Circuit majority erroneously found evolved into a false arrest because of the "felony stop" procedures used.

Even the brief 20 minute detention was caused by the actions of Plaintiffs, not the police. First, the Plaintiffs failed to respond to police commands given on the loudspeaker after they were pulled over an a busy interstate. Second, their alibi that they were filming their work as stonemasons with an expensive

camcorder was suspect as they could not name the street they worked on or the name of the person who paid them for the masonry work they did. As the dissent noted,

> "... detention in this case might have been insignificantly brief but for the plaintiffs' inability to respond to police commands, or provide either the name of the person who employed them for masonry work or the address at which it was performed...[The Plaintiffs'] exculpatory explanation for their presence on the dead end street, the claim that they were building a wall at an address on the street that they could not specify for an employer whom they could not name [were] improbable assertions, especially viewed in the context of the initial complaint, [and] are strongly conducive to a finding of probable cause." (23 F3d 642, dissent at 651; emphasis added).

The trial court and the Second Circuit majority ignored ample evidence that this incident was a reasonable high risk stop, and the "felony stop" procedures were based upon the need for police to defend

themselves and the public; that the police acted consistently with their training; that the police acted properly in using the "felony stop" procedure to investigate a valid civilian complaint of a possible felony, on a crowded interstate in rush hour traffic; that the plaintiffs could, if not detained and restrained, either use a concealed weapon or engage the police in a high speed chase and so endanger other motorists. The majority decision has jeopardized the felony stop procedure, and will endanger the safety of police officers, since "felony stops" may lead to suits for damages if there is no crime. Approaching stopped cars is the second most common cause of death of police officers.

The Court charged the jury that there was a false arrest as a matter of law,

and that no reasonable police officer would have acted as these police officers did, and therefore the jury must find damages for the Plaintiffs. The jury returned a verdict for $60,000 compensatory damages against the individual officers and $15,000 punitive damages against the supervisor, Capt. Tomlin. The Court denied the Defendants' Motion for Judgment N.O.V./New Trial.

After the defendants filed an appeal, the Second Circuit by majority decision (Newman, C.J. and Cardamone, J; Mahoney, J. dissenting) dated April 28, 1994 affirmed the District Court (TFG Daly, J) which found as a matter of law that a Terry stop became an illegal arrest as a matter of law; the Second Circuit remanded only the issue of qualified immunity as a fact-bound decision that

should be determined by a jury. Although the majority properly reversed the trial court on the issue of qualified immunity, it unduly restricted this right since the trial court will inform the jury that, as a matter of law, the defendant police officers falsely arrested the plaintiffs.

Judge Mahoney in his dissent read the record on appeal differently from the majority, and found sufficient evidence for a jury to determine that the Terry stop was proper, and that there was probable cause for the arrest:

> "A reasonable jury could conclude, however, that the plaintiffs' apparent inability to explain their presence in the neighborhood, together with the complainant's report of a suspected burglary, resulted in a police perception of probable cause very early in the course of the plaintiffs' detention. Alternatively, a reasonable jury could conclude that the Terry stop did not evolve into an arrest during the quite limited period when the plaintiffs were detained and the police undertook an investigation that

resulted in the plaintiff's release." (id, at 652; emphasis added).

REASONS FOR DENYING CERTIORARI

The Respondents agree that certification should be granted, but not for the reasons proffered by the Petitioners.

A. Claimed Error of a "Second Look"

The Petitioners claim that the Second Circuit erred when it found as a matter of law that there was a false arrest, but still remanded the case to a jury on the issue of probable cause. The Petitioners also agree with the majority criticism of Anderson v. Creighton, 483 US 635, 643 (1987) that there should be a "second look" that a police officer can reasonably act unreasonably (Petitioner's Brief at pg. 13; Oliveira v. Mayer, 35 F.3rd 642, at 648).

The Respondents agree that the majority decision is erroneous for different reasons: the majority misread the record to find a false arrest, and because the majority's recitation of facts is internally inconsistent. The majority states that the detention took 30 minutes "after the plaintiffs were stopped" (23 F.3d at 644), which distinguishes this from other cases finding that a 20 minute detention did not cause a Terry stop to become an arrest. On the other hand, in footnote 3 at page 650, the majority notes the defendants' version is that the plaintiffs were detained for only 20 minutes. This approach undercuts the majority's statement that the record was viewed in the light most favorable to the defendants in reviewing whether the trial

court properly directed judgment in favor of the Plaintiffs (23 F.3d at 645).

Judge Mahoney, in his dissent, found that there was nothing unconstitutional about the use of standard "felony stop" procedures:

> The "oppressive" elements of the encounter involved, as a majority seems to acknowledge, fairly standard felony stop procedures. If there is a basis to detain a suspect, the detention does not become an arrest simply because the suspects are handcuffed ... Moreover, "a person is not under arrest simply because he is placed in a police patrol car." ... In addition, the relative brevity of the detention argues against the conclusion that there was an arrest ... The detention in this case might have been insignificantly brief but for the plaintiffs' inability to respond to police commands, or provide either the name of the person who employed them for masonry work or the address at which it was performed. And when the plaintiffs' provided the police with a telephone number that would resolve their identification, the person who answered the phone could not speak English. (id, at 651; emphasis added).

The dissent points out the serious error in the analysis of the majority, since it outlaws the use of standard felony stop procedures if in hindsight there is no crime, the first time this has been done by any court of appeals:

> The alternatives are to forgo the Terry stop, or to execute it on the basis of necessarily limited information without taking "felony stop" precautions, and hope for the best. I don't regard either option as a constitutional requirement. (id at 651).

As Judge Mahoney states, the majority engaged in "unrealistic second-guessing" of nationally established police procedure that was discouraged in U.S. v. Sharpe, 470 U.S. 675, 105 S. Ct. 1568, 84 L. Ed.2d 605 (1985).

> In my view, both the district court ruling on liability and the majority opinion in this court constitute unwarranted exercises of

the sort of 20-20 hindsight that Sharpe disparages. (id at 652).

The implications of the majority decision are enormous, as felony stop procedures are now unconstitutional, at least in the Second Circuit.

B. Claimed Error of Remand to the Jury to Determine Qualified Immunity

The Petitioners confuse the caselaw when they argue that the issue of qualified immunity must be determined by the court, and not by a jury.

The Respondents agree that the majority opinion's discussion about "qualified immunity" is in error. The majority discussion about qualified immunity is full of "seeming circularity" and is "especially perplexing" (at pg. 648). But this error is caused by the majority's selective and strained reading of the record in an attempt to justify

the trial court's ruling that, as a matter of law, the police violated the plaintiffs' Fourth Amendment rights (using the forbidden standard of hindsight), and yet the jury could find on remand that the police still acted "reasonably".

The majority explicitly questions the Supreme Court decision in Anderson v. Creighton, 483 US 635, 107 S Ct 3034, 97 L Ed2d 523 (1987) at footnote 2, pg. 649: "With respect, the writer is not wholly persuaded by the Court's explanation [of qualified immunity]..." citing Newman, "Suing the Lawbreakers: Proposals to Strengthen the § 1983 Damage Remedy for Law Enforcers' Misconduct", 87 Yale L.J. 447, 460-1 (1978).

Other courts have adopted this criticism, eg. Edwards v. Cabrera, 861

F.Supp 664, 679 (N.D.Ill. 1994). This is reason alone to grant certification.

It is respectfully submitted that the majority's decision needlessly confused the concept of qualified immunity. The dissent is correct that the majority misread the record, and the facts could support a jury decision that the police acted properly in making a Terry stop, and the use of standard felony stop procedures because of the crowded Turnpike conditions and the felony crime under investigation was proper. The majority decision ignored the evidence favorable to the police in order to constrict the latitude given to the police by the doctrine of qualified immunity, which protects not just the police, but the public. The 20-20 hindsight of the majority would unduly

restrict the "ample room for mistaken judgments" so police don't always err on the side of caution, Hunter v. Bryant, 502 U.S. __, 112 S.Ct. 534, 116 L.Ed.2d 589, 596 (1991); Anderson v. Creighton, 483 U.S. 635, 638 (1987) (officials should be "free from the specter of endless and debilitating lawsuits" especially in investigation of crime, since the ability to protect the public would be chilled if subject to second-guessing); Gramenos v. Jewel Companies, Inc, 797 F.2d 432 (7th Cir. 1986) (an "officer should not risk his career and fortune by believing an apparently sober eyewitness to a crime" at 439).

The majority analysis conflicts with Dempsey v. Town of Brighton, 749 F. Supp. 1215 (W.D.N.Y. 1990), *affirmed* without op'n, 940 F.2 648 (2d Cir.), cert

denied, 112 S. Ct. 338, where summary judgment was granted for the police on claims of false arrest, based upon an investigatory stop with the same "felony-stop" procedures that were used in this case (the public address system was used to order the driver to throw his car keys out; the driver and the passenger were ordered to lie face down on the ground; the officers had their weapons drawn; both driver and passenger were detained for 20 minutes while identification was resolved).

This also conflicts with Courson v. McMillian, 939 F.2d 1479, 1490-1 (11th Cir 1991) (police officer pulled plaintiff's vehicle over because of suspected narcotic involvement near a marijuana field; plaintiff was an innocent female who was released, after

being ordered to lie on the ground with a shotgun aimed at her for 20 minutes).

Here, the majority rejected as unconstitutional a standard police policy that was taught by the State of Connecticut in a training bulletin and which followed a national policy. From now on, the police (at least in the Second Circuit) risk a civil rights lawsuit if they use felony stop procedures and there is no crime. Unlike a recent case where procedures used by the Secret Service were found to have violated the constitution, without any prior ruling, and there was no qualified immunity since "no reasonable officer" would do what was done (allow TV cameras into a residence during the execution of a search warrant); Ayeni v. Mottola, 35 F.3rd 680, 686 (2d Cir. 1994, Newman,

CJ); in Oliveira the police followed standard procedures taught by the State of Connecticut when investigating a suspect felony on a crowded highway.

The majority ignored the comments in Dempsey, id, which conceded that the police have the right to protect themselves, and it is unreasonable for the courts to require police officers to take "unnecessary risk in the performance of their duties ... we would be heartless if we did not share the officers' concern for their own safety ... we cannot impose on law enforcement personnel the Hobson's Choice of keeping their guns holstered when to do so increases a risk that they will be shot", and that car-stop situations are "especially hazardous and support a need for added safeguards". (At pg 1225). The Dempsey court noted that,

based on what had occurred and based on the information that the police had, it may well have been a dereliction of duty for them to have simply let the suspects drive away. (At pg 1228).

While it may be theoretically possible to distinguish the facts in this case from Dempsey, this should be for a jury to decide.

CONCLUSION

The Respondents agree that a petition for certification to review the Second Circuit majority decision should be granted, but not for the reasons stated by the Petitioners. The majority decision eviscerates the concept of qualified immunity. Here police officers responded quickly to a valid citizen complaint, followed their training in using standard felony stop procedures on a crowded

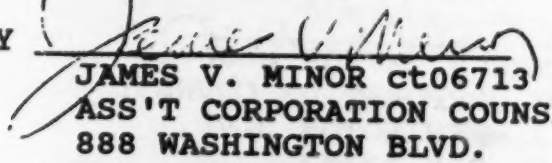
turnpike, and promptly resolved the issue of whether a crime had been committed. The Second Circuit ruled this violated the constitutional rights of the Plaintiffs, rejecting ample evidence favorable to the police, and which the dissent found was convincing enough to be a jury issue. Because the majority misread the record, its decision will create future confusion, as a future jury will be charged on retrial that the police as a matter of law falsely arrested the plaintiffs, although their actions may not be actionable if this "mistake" was reasonable.

The majority decision erred by misreading the record and using 20-20 hindsight to determine the Terry stop evolved into an illegal arrest, rather than allowing a jury to place themselves

in the shoes of the officers at the scene, to determine if they acted properly.

For the foregoing reasons, the Petition for a Writ of Certiorari to review the decision of the Second Circuit in this matter should be granted, not for the reasons suggested by the Petitioners, but rather for the reasons set forth above and in the Respondents' Petition for Cert (#94-526).

THE RESPONDENTS
GEORGE MAYER, ET AL

BY 

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CERTIFICATION

This is to certify that all parties required to be served have been served in accordance with Rule 29: three copies of the foregoing Brief in Opposition have been mailed on November 30, 1994, postage prepaid to:

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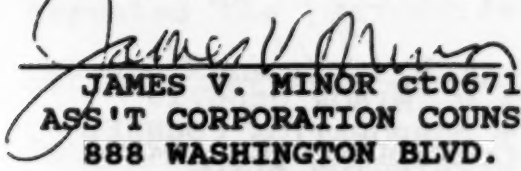

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